reasonable. *Savage* v. *Savings Ass'n*, 45 W. Va. 275, 31 S. E. 991; *Nute* v. *Hamilton Mut. Ins. Co.*, 6 Gray (Mass.) 174. But *cf. Greve* v. *Aetna Live Stock Ins. Co.*, 81 Hun 28, 30 N. Y. Supp. 668. Clearly this principle renders general arbitration agreements ineffectual to oust the courts of jurisdiction, however unfortunate it may be to discourage the settlement of disputes out of court. See 1 PAGE, CONTRACTS, § 348. But where the contract calls for performance of a duty to be fixed by arbitration, the clause is valid, as arbitration is then a condition precedent to any cause of action at all. *Hamilton* v. *Ins. Co.*, 136 U. S. 242. See A. C. Burnham, "Arbitration as a Condition Precedent," 11 HARV. L. REV. 234. Mere words, however, will not make it a condition precedent when the arbitration serves not to define the duty but to determine its infringement. See *Meacham* v. *Jamestown, F. & C. R. Co.*, 211 N. Y. 346, 352, 105 N. E. 653, 655. In Massachusetts, the doctrine of *Nute* v. *Hamilton Mut. Ins. Co.*, *supra*, invalidating territorial limitations on suit, had been seriously undermined. *Mittenthal* v. *Mascagni*, 183 Mass. 19, 66 N. E. 425; *Daley* v. *People's Bldg., etc. Ass'n*, 178 Mass. 13, 59 N. E. 452. The present case, however, brings Massachusetts once more into harmony with the generally accepted doctrine.

INSURANCE — EMPLOYER'S LIABILITY INSURANCE — LIABILITY OF INSURER BEFORE PAYMENT BY EMPLOYER. — An employer took out insurance against losses resulting from injuries to employees. In a suit defended by the insurance company the plaintiff recovered a judgment against the employer for death of her husband. As the employer was totally insolvent, the plaintiff took an assignment of the policy and now sues the company, admitting that the policy is for reimbursement only. *Held*, that she may recover. *Davies* v. *Maryland Casualty Co.*, 154 Pac. 1116 (Wash.).

When, as in the principal case, the policy is indisputably an agreement merely to reimburse the employer for losses actually suffered and not to exonerate him from liability, a payment by the employer is a condition precedent to a right of action on the policy which his insolvency makes impossible of performance. *Frye* v. *Bath Gas & Electric Co.*, 97 Me. 241, 54 Atl. 395; *Cushman* v. *Carbondale Fuel Co.*, 122 Iowa, 656, 98 N. W. 509. See *Puget Sound Imp. Co.* v. *Frankfort Marine, etc. Co.*, 52 Wash. 124, 131, 100 Pac. 190, 193. A feeling of sympathy for the employee, however, has led to a tendency to construe the policy as one for exoneration, whenever possible. Thus, when the policy provides that the insurer shall defend suits against the employer, express provisions that the policy is for reimbursement of actual loss have been held to apply only to liability incurred without suit, on the theory that such action is inconsistent with a mere agreement to reimburse. *Sanders* v. *Frankfort, etc. Co.*, 72 N. H. 485, 57 Atl. 655; *cf. Campbell* v. *Maryland Casualty Co.*, 52 Ind. App. 228, 97 N. E. 1026. But if, as in the principal case, the policy is construed as one for reimbursement only, it is difficult to see how the mere fact that the insurer attempts to protect his contingent liability by defending the suit can estop him from asserting the existence of this condition precedent. *Carter* v. *Ætna Life, etc. Co.*, 96 Kan. 275, 91 Pac. 178. A more difficult question arises when the employer is not totally insolvent, but is bankrupt and paying a dividend. Logically, the employee should be given his dividend along with the other creditors, the amount paid to him should be collected from the insurance company, a dividend in this should be given to the employee, and this process of payment and collection continued indefinitely. *Cf. Royal Bank of Scotland* v. *Commercial Bank of Scotland*, 7 A. C. 366. But to perform this infinite series of transactions would be impossibly cumbersome, while to compute the result and assess compensation from the insurance company for all these sums at a single transaction would involve the logical inconsistency of forcing indemnity at a time when the employer could not have paid the whole amount assessed. An Amer-

ican court, recognizing these difficulties, has applied a rule of thumb by which the employee may recover from the insurer as great a percentage of his judgment as is given to the other creditors out of the remaining assets of the employer. *Moses* v. *Traveller's Ins. Co.*, 63 N. J. Eq. 260, 49 Atl. 720. See 18 HARV. L. REV. 154; 59 CENT. L. JOUR. 5. Since this involves no greater inconsistency, and reaches practically the same result, it seems preferable.

INTERSTATE COMMERCE — DISCRIMINATION AGAINST SHIP BROKERS — EXCLUSIVE STORAGE FACILITIES ON A CARRIER'S WHARF. — A railroad, which, by owning a wharf connecting with ocean freight carriers was able to issue through bills of lading, granted the exclusive storage facilities on the wharf for "parcel" freight, to a ship broker, but gave equal facilities to all for "full-cargo" shipments. The plaintiff, another ship broker, sues to recover damages for this discrimination. *Held*, that he may not recover. *Gulf, etc. R. Co.* v. *Buddendorff*, 70 So. 704 (Miss.).

Despite the general statutory and common-law prohibitions against discrimination, public carriers have been allowed discretionary power in the assignments of certain of their facilities. *Audenried* v. *Philadelphia & Reading R. Co.*, 68 Pa. St. 370. Thus the grant of exclusive carriage privileges at a station has been upheld by the courts. *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, 296; *Ex parte Painter*, 2 C. B. (N. S.) 702. And there is considerable authority sustaining a railroad in its assignment of exclusive privileges to an express company. *Express Cases*, 117 U. S. 1, 29; *Atlantic Express Co.* v. *Wilmington, etc. R. Co.*, 111 N. C. 463, 16 S. E. 393. These cases, however, rest in part on the ground that a railroad is a common carrier of freight and not of parcels sent under special supervision. See *Sargent* v. *Boston & Lowell R. Co.*, 115 Mass. 416, 422. The discrimination made in the principal case as to storage facilities for "parcel shipment" only, would seem to be within this reasoning. But the general current of authority is contrary to the argument of the *Express Cases*. *Pickford* v. *Grand Junction R. Co.*, 10 M. & W. 399; *McDuffee* v. *Portland & Rochester R. Co.*, 52 N. H. 430. It would seem as if the true basis of the *Express Cases* must be the public welfare balanced against individual discrimination. See *Sandford* v. *Catawissa, etc. R. Co.*, 24 Pa. St. 378, 382. The extremes between which variation in the right of discrimination is possible seem to have one limit in the cases holding that competing carriers have no right to each other's wharves. *Weems* v. *People's Steamboat Co.*, 214 U. S. 345. The other limit is determined by the cases denying a carrier's right to discriminate between patrons, even though one's business is very large. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — CONSCIOUS VIOLATION OF A STATUTE AS "WILFUL MISCONDUCT." — An employee was killed by an accident in the course of and arising out of his business while driving an automobile at an illegal rate of speed. The statute refuses compensation if the "wilful misconduct" of the employee was a proximate cause of the accident (1911–1913 CALIFORNIA LAWS, CONSOLIDATED SUPP., p. 1420). Compensation was awarded his widow. *Held*, that the award be set aside. *Fidelity and Deposit Co.* v. *Industrial Accident Commission*, 154 Pac. 834 (Cal.)

In several of the United States recovery under the workmen's compensation acts is refused if the accident is attributable to the "wilful misconduct" of the workman. See 1 BRADBURY'S WORKMAN'S COMPENSATION, 2 ed., 518. If the misconduct contemplated by these statutes is solely a wrong to the employer and his business, it is clear that the mere violation of a statute is not necessarily misconduct, as the employer might have acquiesced in the violation. See